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The European Economic Interest Grouping - A Chance for Multinationals?

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Abstract

Developed as a supranational corporate form intended to facilitate cross-border activity by natural and legal persons alike, the European Economic Interest Grouping (EEIG) arguably offers multinational enterprises looking to collaborate with other entities an efficient and effective corporate vehicle for their projects.

Though this form offers multinational enterprises many attractive features, certain drawbacks associated with this form may impede take-up by such entities. After a review of the development of the EEIG (part I), this paper will examine the features and purposes of this corporate form (part II), before looking at the benefits (part III) and the drawbacks associated with this form (part IV). In the conclusion, the author will review possible reforms to this corporate form.

Introduction

Whilst the European Union (EU) has introduced the notion of mutual recognition to guarantee the unfettered movement of goods, the law governing business organisations by its nature renders the concept of mutual recognition difficult to apply in practice since it is national law that determines whether an entity has legal personality.^{1 2 3 4}

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¹ Selected articles reviewing the European Economic Interest Grouping (EEIG) include Mark Abell and Robert Blin, *EC Economic Interest Groupings come to life*, 8 Int'l Fin L Rev 9 (1989); Uwe Blaurock, *Steps Toward a Uniform Corporate Law in the European Union*, 31 Cornell Int'l LJ 377 (1998); Johan de Bruycker, *EC Company Law – The European Company versus The European Economic Interest Grouping and the Harmonization of the National Company Laws*, 21 Ga J Int'l & Comp L 19 (1991); Dominique Carreau and William L. Lee, *Towards A European Company Law*, 9 Nw J Int'l L & Bus 501 (1988- 1989); Cynthia Chessick, 1992: *The Integration of the European Common Market*, 2 DePaul Bus LJ 149 (1989-1990); Brian R. Chiffen, *Establishing Business Operations in the European Economic Area: Key Company Law Principles*, 17 Int'l Legal Prac 102 (1992); Alfred Conrad, *European Alternative to Uniformity in Corporation Laws*, 89 Mich L Rev 2150 (1990-1991); Janet Dine, *The European Community's Company Law Directives - Changing the Balance of Power?*, 1 KCLJ 41 (1990-1991); David Donald, *Company Law in the European Community: Toward Supranational Incorporation*, 9 Dick J Int'l L 1 (1991); Eric Engle, *The EU Means Business: A Survey of Legal Challenges and Opportunities in the New Europe*, 4 DePaul Bus & Comm LJ 351 (2005-2006); Richard English, *Company Law in the European Single Market*, 1990 BYU L Rev 1413 (1990); Piet Everaert, *An EEIG: When and where is it a permanent establishment?*, 1 Int'l Tax Rev 27 (1989-1990); Lisbeth Grodum, *Denmark's EEIG gets general partnership treatment*, 2 Int'l Tax Rev 34 (1990-1991); and Daniel T. Murphy, *The European Economic Interest Group (EEIG): A New European Business Entity*, 23 Vand J Transnat'l L 66 (1990-1991). The EEIG is reviewed in the following official report produced by the United States International Trade Commission, *The Effects of Greater Economic Integration within the European Community on the United States - Third Follow-up Report* (Washington: United States International Trade Commission, 1991). Available at http://books.google.fr/books?id=5N2ZAAAAIAAJ&pg=SA1-PA22&lpg=SA1-PA22&dq=EEIG+conference.+Brussels+1989&source=bl&ots=KFauUapvWXw&sig=cG3wkOG4n3UjkMbtKhBb2iWeG_c&hl=en&sa=X&ei=rz9UOXpEIqV0QXD2IGADQ&sqi=2&ved=0CCsQ6AEwAA#v=onepage&q&f=false (last accessed 20 August 2013) (1991 USITC Report). The EEIG is also reviewed in the following official publication produced by the European Commission, *The EEIG: An instrument for transnational cooperation – A practical guide for SMEs* (1998) (1998 Commission Report on EEIG).

In a bid to find a workable solution to this difficulty, the Member States opted for the recognition of supranational corporate forms rather than needing to recognise the company law of each other. The resulting supranational corporate forms are not intended to replace national forms, instead being supplementary to these national forms, effectively create 'an independent and neutral stratum upon which businesses can move from one Member State to another in a cost-effective manner.'⁵

Whilst earlier efforts by the EU were specifically targeted at the harmonisation process, the formulation of supranational corporate forms was and still is topic of confabulation not only at the institutional and national levels but also amongst academics and within business circles.

This lengthy process of dialogue and compromise has culminated in the formulation of two prime supranational European-level corporate forms. The first is the European Economic Interest Grouping (the EEIG). The second, the SE (the European Company). Though both share certain similarities, they are substantively different.

Part I

Development of the EEIG as a Corporate Form

The idea of a company with international capacity governed by international statute was pioneered in 1897 by an Italian lawyer named Fedozzi. He believed that the creation of such a corporate form would effectively facilitate the creation of large enterprises suited to rapid development of industry.⁶

The creation of a European corporate form straddling national boundaries was launched almost contemporaneously in 1959 in both France and the Netherlands by C. Thibierge (at the 57th Congress of French Notaries held at Tours) and Professor Pieter Sanders (in his inaugural speech given at Rotterdam School of Economics) respectively.⁷

In December 1973, the European Commission (the Commission) submitted a proposal to the Council for a regulation for a structure permitting cooperation between entities in different Member States.⁸ The Commission believed that such a structure would permit cross-border collaboration amongst entities unhindered by national frontiers⁹ in turn addressing existing disparities between the bodies of substantive national law governing companies in the various Member States. These

² Official documents addressing the EEIG include: European Commission, *Proposal for a regulation of the Council on the European cooperation grouping (ECG)*, COM (73) 2046 (1973) (Proposal 1973); European Commission, *Amended proposal for a Council Regulation (EEC) on the European cooperation grouping (ECG)*, COM (78) 139 final (1978); *Council Regulation (EEC) 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG)*, OJ 1985 L199/1 (1985) (EEIG Regulation); Commission, *Green Paper on Innovation*, COM (95) 688 final (1995); Commission, *The EEIG: An instrument for transnational cooperation – A practical guide for SMEs*, 23-1998-00331-01-00-EN-TRA-00 (EN) (1998) (1998 Commission Report on EEIG).

³ Donald, 'Company Law in the European Community: Toward Supranational Incorporation', 10.

⁴ The historical background is based on official documents produced by the European Commission and posted on <http://aei.pitt.edu> (last accessed August 2011). The primary source used is an information note produced by the European Commission, *European Joint-Stock Company*, P-29/I (1970) http://aei.pitt.edu/31830/1/P_29_70.pdf (last accessed 27 September 2013).

⁵ Donald, 'Company Law in the European Community: Toward Supranational Incorporation', 10.

⁶ De Bruycker, 'EC Company Law – The European Company versus The European Economic Interest Grouping and the Harmonization of the National Company Laws', 199 citing Konstandinidis, *The Historical Evolution of the Concept of the European Company and Their Impact on Greek Law*, 5-6 Hellenic Rev Int'l Rel 285 (1989).

⁷ Paul M. Storm, *A New Impulse towards a European Company*, 26 Bus Law 1443, 1445 (1970-1971) citing the proposal put forth by the lawyer Claude Thibierge at the fifty seventh congress of the French Notaries held in Tours in 1959 [Claude Thibierge, *Le statut des sociétés étrangères* in *Le statut de l'étranger et le marché commun* (57th Congès des Notaires de France, Tours, 1959)] and for the proposal of Professor Pieter Sanders in his speech at the Rotterdam School of Economics on 22 October 1959 referred to in Pieter Sanders, *Naar een Europese N.V.?* (Amsterdam, W.E.J. Tjeenk Willink, 1959).

⁸ Proposal 1973.

⁹ Proposal 1973, Preamble.

contrarities, the Commission argued, created a barrier to synergy amongst entities in different Member States notably undertakings established under the laws of the various Member States.

Whilst prior to the adoption of the EEIG mechanisms existed in the national legal systems of the different Member States enabling entities there to establish connections between them through the taking of shares, contracts between management of the entities, mergers etc, these devices were not deemed sufficient suitable for cooperation at the Community level¹⁰ as recourse to national law was seen to be enough to deter such entities creating a dampening effect on cross-border cooperation and investment.¹¹ According to the Commission:

Recourse to a particular legal system is not always regarded as desirable in business circles, where ignorance of the laws of other Member States can give rise to apprehensions of which neither the reality nor the psychological importance can be doubted.¹²

The EEIG form with its simple rules governing formation and operations was seen as a corporate form that would permit the removal of barriers to cooperation across frontiers¹³ allowing natural and legal persons to carry on their business activities in an enlarged market.¹⁴

The conception of the EEIG was intended to fulfil a number of objectives aims.

Firstly, in response to a concern expressed by European leaders that in order to realise the potential of the Community market (as it was at the time) companies needed to be able to operate on a Community-wide scale,¹⁵ the European legislature created the EEIG in a bid to permit companies of different Member States to form alliances in order to work together.¹⁶

Secondly, the grouping was created in a bid to eliminate barriers within the Community in order to create more advantageous conditions for cross-border relations amongst undertakings.¹⁷

Thirdly, in 1985 the creation of the EEIG was seen by the Commission as precursory to the launch of the SE. At the time

The European Community was not yet ready... for the European Company; therefore the European Commission wanted to provide the European undertakings with a legal framework which would allow certain cross border transactions without creating a European corporation.¹⁸

Fourthly, the EEIG was created as a test case for the European company. Acting as the first step on the road towards the creation of a truly European company. The reception that the EEIG received at the hands of companies and governments was seen by the Commission as indicative of how the European Company would fare if and when it was created.¹⁹

¹⁰ Proposal 1973, Preamble.

¹¹ Proposal 1973, 17.

¹² Proposal 1973, 17.

¹³ Proposal 1973, 17.

¹⁴ Proposal 1973, Preamble.

¹⁵ Conrad, 'European Alternative to Uniformity in Corporation Laws', 2164.

¹⁶ Conrad, 'European Alternative to Uniformity in Corporation Laws', 2164.

¹⁷ Donald, 'Company Law in the European Community: Toward Supranational Incorporation', 11 citing from Proposal 1973, 17.

¹⁸ De Bruycker, 'EC Company Law – The European Company versus The European Economic Interest Grouping and the Harmonization of the National Company Laws', 196-197.

¹⁹ 1991 USITC Report, 1-22, citing the comments of an official of the Department of Trade and Industry, interview by USITC staff, London.

Enacted by the Council of Ministers on 25th July 1985 after more than a decade of discussion, the EEIG Regulation became applicable from 1st July 1989 in the Member States.²⁰

Part II - A Framework surrounding the Cooperation of Members

I. Features

The EEIG provides for a 'somewhat original framework' enabling natural persons, companies, firms and entities governed by public or private law to collaborate across frontiers in order to conduct a portion of their economic activity jointly.²¹

The grouping created under the EEIG Regulation is a legal instrument²² permitting persons - natural and legal alike - to cooperate whilst at the same time allowing them to retain their economic and legal independence.²³ As such the grouping 'represents the framework surrounding the co-operation of the members.'²⁴

This instrument of international co-operation rooted in EU law²⁵ is intended to 'make it easier for enterprises in the EU and the EEA to exercise certain activities on which a co-operation between them would be advantageous'²⁶ by furnishing the means to 'facilitate or develop the economic activities of its members and to improve or increase the results of those activities.'²⁷

Modelled on the French GIE (*groupement à l'intérêt économique*) as an intermediate corporate form between a company and an association the EEIG²⁸ is different from a company and a firm in a number of respects.²⁹

Firstly, the EEIG is an instrument for collaboration that neither replaces nor absorbs its constituent members.³⁰ Rather than replacing its members the EEIG functions as a vehicle that allows these members to enhance their individual and collective performance. Secondly, at no point during its existence can the EEIG be used to absorb its constituent members. Each retains its legal and economic

²⁰ EEIG Regulation, Art. 43.

²¹ Mads Andenas and Frank Wooldridge, *European Comparative Corporate Law* 377 (Cambridge: Cambridge University Press, 2009).

²² 'The Regulation creates a legal framework in which natural persons, companies, firms and other legal entities can cooperate across frontiers, by means of a new legal instrument.' (Case C-402/96 European Information Technology Observatory, Europäische Wirtschaftliche Interessenvereinigung [1997] ECR I-07515 (EITO case), para. 7).

²³ EEIG Regulation, Art. 3(1).

²⁴ Erik Werlauff, *EU - Company Law* 119 (Copenhagen: DJØF, 2003).

²⁵ Carreau and Lee, 'Towards A European Company Law', 505.

²⁶ Werlauff, *EU - Company Law*, 118.

²⁷ EEIG Regulation, Art. 3(1).

²⁸ Werlauff, *EU - Company Law*, 116. The denominations in the various Member States include EESV (in Belgium), GIE (in France), EWIV (in Germany), GEIE (in Italy), AEIE (in Spain) and EEIG (in the UK). EESV stands for *europées economisch samenwerkingsband*. GIE stands for *groupement d'intérêt économique*. EWIV stands for *europäische wirtschaftliche interessevereinigung*. GEIE stands for *gruppo europeo di interesse economico*. AEIE stands for *agrupacion europea de interés economoci*. Groupings are permitted and required to use one of the denominations noted (Werlauff, *EU - Company Law*, 117). Moreover, such groupings will also be required to comply with the provisions of national law on company and business names (Werlauff, *EU - Company Law*, 117). In this context it is worthwhile giving due consideration to the decision of the European Court of Justice (ECJ) in the EITO case which establishes that national law applicable to a grouping may impose more extensive requirements than those following from EEIG Regulation, Art. 5(a), which states that the designation European Economic Interest Grouping or the abbreviation EEIG must be included within the registered name of the grouping. (Werlauff, *EU - Company Law*, 117) In the EITO case, the ECJ states that '[t]he Regulation thus provides that the business name of an EEIG must include the words 'European Economic Interest Grouping' or the initials 'EEIG', but is silent as to the content of the name. It follows that requirements in that connection may, in accordance with Article 2(1) of the Regulation, be imposed by the provisions of internal law applicable in the Member State in which the grouping has its official address.' (EITO case, para. 22)

²⁹ Werlauff, *EU - Company Law*, 116.

³⁰ De Bruycker, 'EC Company Law – The European Company versus The European Economic Interest Grouping and the Harmonization of the National Company Laws', 197-198.

independence throughout the life of the EEIG. Thirdly, though the EEIG is able to generate profits, the EEIG is not intended to be used as a profit-making entity in its own right.³¹

The Regulation governing EEIGs allows entities to create something that resembles, at the same time, both a partnership³² and a joint venture.³³ According to Professor Donald the 'closest American parallel to the EEIG would be a partnership form that allowed - or even required - the partners to reside in different states.'³⁴ The EEIG is analogous to the partnership form under US law, since the EEIG which represents 'the formalisation of a network or collaborative project'³⁵ between entities is 'more of a network of individual persons and firms than an entity in itself.'³⁶

Professor Engle likens the EEIG to 'an institutional form for joint venture partnerships between two or more companies, whether public or private.'³⁷ He argues that whilst the formation contract concluded between the participants in the EEIG 'does not create a legal person independent of the partners to the EEIG... the EEIG can enter into contracts in its own name.'³⁸

II. Purposes

The grouping may be used by its constituent members for a variety of ends.

Firstly, members of a grouping may decide to use the structure for a specific on-going activity or for a one-off venture.

Such a grouping may be used in a representative capacity on behalf of constituent members in order to submit and secure tenders for public contracts and subsequently it may be employed in a supervisory capacity to oversee the implementation of such works.³⁹

In the alternative, constituent members may opt to make use of the grouping in order to develop, manufacture, assemble and/or market goods. Car manufacturing and telecommunications are just two examples of industries that could benefit from such a structure. Arguably in place of a joint venture corporation (JVC) or in addition to one, the EEIG could act as a vehicle for collaboration between members based in the EU and the EEA for a specific project or for a continuous venture. The EEIG could be employed alongside a JVC or in lieu of one in order to develop a more efficient engine for cars or new technology for the telecommunications sector.

Secondly, the grouping may be used as an instrument for cross-border cooperation on specific projects or for long term purposes.

This corporate form permits the pooling of resources by constituent members for the accumulation of common technical knowledge,⁴⁰ the carrying out of common research, the development of common know-how, novel or improved processes and products as well as the coordination of centralised administration of highly-specialised services.⁴¹ Groupings have for example been used in order to conduct research into high definition TVs and to provide common services to the legal profession.⁴²

³¹ Abell and Blin, 'EC Economic Interest Groupings come to life', 9.

³² Donald, 'Company Law in the European Community: Toward Supranational Incorporation', 3.

³³ Engle, 'The EU Means Business: A Survey of Legal Challenges and Opportunities in the New Europe', 377.

³⁴ Donald, 'Company Law in the European Community: Toward Supranational Incorporation', 11.

³⁵ Bill Millar, *Economic interest grouping launched*, The Scotsman 1 (11 October 1993)

³⁶ Donald, 'Company Law in the European Community: Toward Supranational Incorporation', 11.

³⁷ Engle, 'The EU Means Business: A Survey of Legal Challenges and Opportunities in the New Europe', 377.

³⁸ Engle, 'The EU Means Business: A Survey of Legal Challenges and Opportunities in the New Europe', 377.

³⁹ Werlauff, EU - Company Law, 118.

⁴⁰ Werlauff, EU - Company Law, 118.

⁴¹ Werlauff, EU - Company Law, 118.

⁴² Examples given by Werlauff, EU - Company Law, 118-119.

An EEIG may for example be established by professional entities (companies, partnerships or individuals) in different Member States on the proviso that the applicable professional rules do not limit or prohibit participation in such a grouping.⁴³ A firm of solicitors in England may for example create an EEIG with one or more firms of lawyers throughout the EU to help further the respective operations of the different participating entities.

Such entities may opt to use the grouping for the purpose of tendering for work, running support activities (call centres, out of hours services etc), carrying out joint research (of a legal and business nature) and promoting their respective businesses.

An EEIG may even be used by participating law firms for litigation purposes, allowing law firms based and operating in different Member States to bring a class action on behalf of their respective clients.

In the case of CMS, a network of European law firms formed in July 1999 and incorporated in Germany, the grouping of independent firms with representative offices in China and North Africa is able to deliver a 'one-stop shop for clients who want that.'⁴⁴

What is more, this cross-border collaboration which employs 'a single corporate identity and logo'⁴⁵ has a competitive edge when pitching for work and securing client loyalty. Andrew Sheach, Head of UK Corporate for CMS, explains that this results from 'the experience and local knowledge we have ... Our competitors just don't have as many offices or strength in depth and size.'^{46 47}

Thirdly, the grouping may be used on a trial basis by constituent members in order to ascertain if they are able to commit to each other on a more permanent basis.⁴⁸ Members may decide for example to form a grouping as a precursor to the creation of an SE. In the alternative members may view the grouping as a forerunner to the realisation of a cross-border merger or as a pilot study before the execution of an acquisition.

Part III – Benefits

Introduced as part of the effort to establish a common market 'in which conditions are the same as those on a national market'⁴⁹ and in recognition of the fact that the different forms existing under national laws are not suitable for cooperation at the European level specifically due to the fact that these are creatures of national law, the EEIG represents a step on from a loose contract-based form of cooperation.⁵⁰

I. Uniformity of Treatment

Introduced by means of a regulation,⁵¹ which governs, if not fully at least partially, most issues affecting the life of the grouping, the EEIG has been rightly described by the Commission as being primarily 'a creature of Community law.'⁵²

⁴³ Saleem Sheikh, *Business Law & Practice Transactions Guide* 84 (London: Cavendish Publishing Limited, 1999).

⁴⁴ Andrew Sheach Head of UK Corporate for CMS quoted in *The Lawyer*, *One-track mind* 1, 20 (30 July 2012).

⁴⁵ *The Lawyer*, 'One-track mind', 20.

⁴⁶ Andrew Sheach Head of UK Corporate for CMS quoted in *The Lawyer*, 'One-track mind', 20.

⁴⁷ Andrew Sheach adds that in 2011 the grouping that uses a single corporate identity and logo secured over 50 percent of it pitches. (*The Lawyer*, 'One-track mind', 20) *The Lawyer* points out that the success rate for pitches in 2011 was 63 percent 'with an average of four CMS member firms featuring per pitch, representing on average six countries.' (*The Lawyer*, 'One-track mind', 20)

⁴⁸ Proposal 1973, 17.

⁴⁹ Proposal 1973, Preamble.

⁵⁰ Proposal 1973, Preamble.

⁵¹ EEIG Regulation.

⁵² Proposal 1973, 17.

The issues addressed by the EEIG Regulation include, but are not limited to, issues of formation, capacity in law, internal organisation, liability of members and the handling of profits. Issues not addressed by this Regulation are left to be dealt with by the members of the grouping (in their contract for formation of the grouping) and national law (referred to by the Regulation as internal law).

By using a directly applicable regulation, the European legislature has ensured that each one of the Member States possess a uniform framework of rules governing EEIGs. Whilst each Member State has introduced its own national version of the EEIG⁵³ the resulting national forms are still strongly rooted in a European regulation which is directly applicable in the different Member States. The result is that the EEIG 'has broadly the same legal structure across the EC'⁵⁴ and is extended the same treatment by the various Member States.

II. European Existence and Character

The formation of the EEIG and its legal existence are rooted in European law even though reference is made to national laws in relation to certain matters affecting the EEIG.

It is this endowment of legal capacity on the grouping by the EEIG Regulation which effectively transforms the EEIG into a supranational entity with recognised capacity under European law and the national laws of the various Member States. Professor Donald states in this regard that this form alongside the other supranational corporate forms available under EU law (such as the SE) effectively create 'an independent and neutral stratum upon which businesses can move from one Member State to another in a cost-effective manner.'⁵⁵

The supranational character of the EEIG is facilitative, it being 'much easier to convince a foreign company to enter into a cooperation agreement using an instrument that both parties know - it is national law for both parties - than asking a foreign partner to enter into, for instance, a Danish ApS (limited liability company) or a Danish A/S (joint-stock company), which differ in structure from the continental or British company model.'⁵⁶

III. Operational Versatility

The hierarchy of rules applicable to groupings provides that groupings are governed not only by the substantive provisions of the EEIG Regulation but also by the terms of the agreement concluded between the constituent members of the grouping in circumstances where the Regulation explicitly provides so.

The provisions of the EEIG Regulation provide a underlying framework for the operations of the grouping leaving many substantive questions to the members themselves to determine. This formatting ensures the injection of flexibility into the operations of the EEIG. It is this tensility that has been praised by business leaders alongside the lack of a minimum capital requirement and the European character of the EEIG.⁵⁷

The objective in this context is the empowerment of the founding members. This is achieved by allowing such members to devise a grouping with an anatomy and constitution which fits in with their needs and during its lifetime to permit these members to rework and to refine the configuration of

⁵³ Grodum, 'Denmark's EEIG gets general partnership treatment', 34.

⁵⁴ Grodum, 'Denmark's EEIG gets general partnership treatment', 34.

⁵⁵ Donald, 'Company Law in the European Community: Toward Supranational Incorporation', 10.

⁵⁶ Grodum, 'Denmark's EEIG gets general partnership treatment', 34.

⁵⁷ This praise was given by Dr Robb Wilmot CBE, Co-Chairman of European Silicon Structures and Mr Jean Pierson, the Executive Director of Airbus Industrie in their respective speeches delivered at an EEIG conference in Brussels on 18 April 1989 (cited by Dine, 'The European Community's Company Law Directives - Changing the Balance of Power?', 44).

the grouping when required in response to changes in the business context, in the needs of the members and in the legal environment.⁵⁸

The discretion to make decisions regarding a number of key issues concerning the grouping is vested in constituent members. Such decisions include ones pertaining to the internal organisation of the grouping,⁵⁹ the composition of the grouping in terms of membership (subject to the limits imposed by the EEIG Regulation),⁶⁰ the name of the grouping, its duration (if any) and its objectives.⁶¹ Moreover members have the power to determine whether or not weighted voting rights are extended to members.⁶²

By way of illustration, beyond the fact that the CMS network⁶³ shares one corporate identity and logo⁶⁴ it also has its own dedicated constitution, possesses an IT infrastructure shared by all members as well as common policies governing conflicts of interest.⁶⁵ According to CMS executive director Matthew Gorman⁶⁶ 'the one-firm ethos at CMS goes through it like letters through a stick of rock. "[The commonalities are there in] the way we deal with clients through the practice groups and sector groups, training, business development and so on" ...'

Under the provisions of the EEIG Regulation, members of the grouping may decide when as well as if the grouping should be wound up.⁶⁷ They also have the option collectively of putting an end to the winding-up of the grouping if they so choose.⁶⁸ In the event that the grouping is being wound up by the court, the latter is permitted to suspend the making of an order requiring the winding-up if the affairs of the grouping can be and are put into order before the court has delivered a substantive ruling.⁶⁹

Matters agreed upon by the members are in turn encapsulated within the contract for formation.⁷⁰ Agreement by the members is not obligatory as the EEIG Regulation lists certain default rules to accommodate for those circumstances where the members have not agreed upon certain issues.⁷¹

IV. Financial Flexibility and Fluidity

Beyond the fact that there is no minimum capital requirement for the EEIG,⁷² the members of the grouping enjoy flexibility regarding its financing.

⁵⁸ Proposal 1973, 18.

⁵⁹ Discussed further on in this paper.

⁶⁰ Discussed further on in this paper.

⁶¹ EEIG Regulation, Art. 5.

⁶² Though each member in the grouping has one vote (EEIG Regulation, Art. 17(1)), members are permitted to agree in the contract for formation to allocate more than one vote to certain members (EEIG Regulation, Art. 17(1)) on the proviso that no one member is allocated a majority of votes (EEIG Regulation, Art. 17(1)).

⁶³ Discussed in this paper.

⁶⁴ The Lawyer, 'One-track mind', 20.

⁶⁵ The Lawyer, *United front* 1, 26 (5 September 2011).

⁶⁶ The Lawyer, 'One-track mind', 20.

⁶⁷ EEIG Regulation, Art. 31(1).

⁶⁸ EEIG Regulation, Art. 32(1).

⁶⁹ EEIG Regulation, Art. 32(1).

⁷⁰ Agreement by the members is not obligatory as the EEIG Regulation lists certain default rules to accommodate for those circumstances where the members have not agreed upon certain issues. For example pursuant to Art. 17(3) of the EEIG Regulation, decisions that do not require unanimity and are not addressed by the formation contract are to be taken unanimously by the members of the grouping.

⁷¹ For example pursuant to EEIG Regulation Art. 17(3) decisions that do not require unanimity and are not addressed by the formation contract are to be taken unanimously by the members of the grouping.

⁷² Professor Dine citing Mr Jean Pierson Executive Director of Airbus Industrie who praised the EEIG as a form lacking a minimum capital requirement (Dine, 'The European Community's Company Law Directives - Changing the Balance of Power?', 44).

This state of affairs affords flexibility to the EEIG as a corporate structure, by permitting its constituent members not only to formulate a structure that is suited to their needs, but to continuously modify this structure as and when their needs evolve.⁷³ This adaptability contributes to the organic nature of the grouping thereby creating a sustainable corporate structure.

Members are free to agree on the structure that financing will take. They may decide that such financing may take the form of non-cash consideration as well as cash consideration.

This latitude permits participation by entities that may not have the necessary financial resources to provide monetary consideration. Entities may be able to offer an alternative to cash consideration in the form of services, skills, technology, intellectual property rights and so forth.⁷⁴

Contributions made by smaller entities, non-profit making organisations, universities and research centres for example may take the form of non-cash consideration through the rendering of research and development skills, consultancy services, intellectual property (such as patents and know-how), materials and resources (premises, laboratories, electronic resources, personnel and so on).

In addition to the flexibility available with regards to the structure of financing, participating members are free to agree amongst themselves – in the contract for the formation of the grouping - to limit their contributions⁷⁵ and to alter the contributions made (by unanimous decision).⁷⁶

The members of the grouping are also permitted to modify their funding methods, as well as their rights and obligations by means of contract⁷⁷ thus permitting the grouping to evolve in tandem with the needs of the members and the objectives of the grouping.

In the case of the CMS network, for example, each of the participating members in the grouping contributes 'a standard percentage of their revenue to CMS Legal Services, the EEIG that coordinates the CMS organisation of independent member firms.'⁷⁸

V. Management Set-Up

Subject to certain minimum requirements governing the internal organisation of the grouping imposed by the provisions of the EEIG Regulation, the manner in which the grouping is structured internally is largely left up to the members themselves.⁷⁹

The bodies prescribed by the Regulation comprise a body of members acting collectively (collective body of members) which is permitted to make decisions implementing the objectives of the grouping as well as an organ consisting of one or more managers (the management body).⁸⁰

Notwithstanding the requirement that the grouping have a management body and a body of members acting collectively, the EEIG Regulation permits the members of the grouping to create further organs and to award these organs management powers.⁸¹

In the case of the CMS network, constituent members have formulated and developed a bespoke governance structure for the grouping which is encapsulated within a document entitled the CMS agreement. According to this structure, unanimous consent is required from all members of the

⁷³ Proposal 1973, 18.

⁷⁴ Companies House, *Guidance on European Economic Interest Groupings* 1, 6 (2012) (Companies House 2012).

⁷⁵ EEIG Regulation, Art. 21(2).

⁷⁶ EEIG Regulation, Art. 17(2).

⁷⁷ Companies House 2012, 6.

⁷⁸ The Lawyer, 'One-track mind', 20.

⁷⁹ EEIG Regulation, Art. 16.

⁸⁰ EEIG Regulation, Art. 16.

⁸¹ EEIG Regulation, Art. 16(1).

executive committee in relation to decisions affecting the CMS network.⁸²⁸³ This committee is responsible for defining strategy for the network and consists of the managing partner, the CMS executive chair, the CMS executive director as well as one further partner from each one of the participating members in the grouping.⁸⁴

VI. Management – Powers, Appointment and Dismissal

Members of the grouping enjoy wide-reaching discretion in relation to the manner in which the management body operates and the mechanisms used to appoint and dismiss managers. Moreover they retain the power to call the managers to account and possess the right to ask to inspect the records and books of the grouping.⁸⁵

Members are free to define the powers of the managers on the management body,⁸⁶ as well as the conditions for their appointment and dismissal.⁸⁷ They retain the discretion regarding the composition of the management organ.

Whilst natural and legal persons are permitted to serve as managers of a grouping,⁸⁸ a legal person is only permitted to serve as a manager of a grouping when national law allows for such an appointment and the legal person appoints one or more natural persons as their representatives. Such representatives are liable as if they themselves were managers of the grouping.⁸⁹

VII. Assignment, Admission, Death and Termination

In order to add value to the projects undertaken under the auspices of the EEIG and to ensure the ready and continuous injection of capital and ideas, free transferability and the freedom to admit new members are both important features.

Assignment of participation in the grouping and the admission of new members into the grouping are both permitted under the EEIG Regulation on the proviso that the unanimous authorisation of the other members in the grouping is obtained.⁹⁰

To ensure continuity and certainty, the EEIG Regulation incorporates provisions that guarantee the longevity of the grouping and its activities. These provisions state that neither the death of a member nor the departure of a member will bring the grouping to an end.⁹¹

Whilst death of a constituent member will terminate the membership of the deceased in the grouping, this death will not bring the grouping to an end.⁹² Unless a provision is made in the contract for formation or the remaining members unanimously agree on this, no person is permitted to replace the deceased member.⁹³

This provision prevents a situation where a new member is introduced into the grouping who is unknown to the remaining members. Where a prospective member is proposed in lieu of the deceased member, the remaining members have the choice to unanimously agree on the admission of

⁸²The Lawyer, 'One-track mind', 20.

⁸³ Under the 'CMS's governance structure it would take only one of its 10 member firms to vote against a deal with a potential US member to nix the deal.' (The Lawyer, 'One-track mind', 20)

⁸⁴The Lawyer, 'One-track mind', 20.

⁸⁵ EEIG Regulation, Art. 18.

⁸⁶ EEIG Regulation, Art. 19(3). Typically such matters are addressed in the formation contract.

⁸⁷ EEIG Regulation, Art. 19(3). Typically such matters are addressed in the formation contract.

⁸⁸ EEIG Regulation, Arts 19(1) and 19(2) (respectively).

⁸⁹ EEIG Regulation, Art. 19(2).

⁹⁰ EEIG Regulation, Arts 22(1) and 26(1) (respectively).

⁹¹ EEIG Regulation, Arts 28(1) and 30.

⁹² EEIG Regulation, Art. 28(1).

⁹³ EEIG Regulation, Art. 28(2).

this new member. Such an admission may be made conditional upon the conclusion of a contract with the new member pertaining to their admission into the grouping.

When a member stops belonging to a grouping, the grouping itself will continue to exist for the remaining members.⁹⁴ This provision may however be displaced by the terms of the contract for formation.⁹⁵

VIII. Day-To-Day Running of the Grouping

Whilst certain decisions that fundamentally affect the existence and operations of the grouping require a unanimous decision by the members,⁹⁶ other issues affecting the grouping do not require such a decision.⁹⁷

Decisions that may be taken without a unanimous decision by the members will include budgetary decisions that do not affect the contributions of the members, the selection and recruitment of staff to administer the work of the grouping as well as the formulation and implementation of the business strategy for agreed works or projects of the grouping

Day-to-day operations of the grouping will not typically require a unanimous decision taken by the members subject to the provisions contained in the formation contract. Once the members have agreed upon the objectives of the grouping, their implementation is a matter that may be left to one or more of the members or indeed to the management body of the grouping.

This state of affairs facilitates the efficient running of the grouping allowing for dynamic decision-making, adjustment to economic conditions, optimisation of resources and a reduction in unnecessary waste.

IX. Decision-Making Process

Members are free to determine how certain decisions are taken on the proviso that no one member holds a majority of the votes.⁹⁸

Except where the provisions of the EEIG Regulation require that decisions are made by a unanimous vote of the members, the members are free to determine the conditions for a quorum and the requisite majority in accordance with which these decisions are made.⁹⁹¹⁰⁰

If no provision is made in the contract on these matters then they will be determined by unanimous decisions reached by the members of the grouping.¹⁰¹

X. Legal Capacity

⁹⁴ EEIG Regulation, Art. 30.

⁹⁵ As soon as a member stops belonging to a grouping, the manager or managers must advise the remaining members of this fact (EEIG Regulation, Art. 29) and must take steps to duly disclose and publicise the fact (EEIG Regulation, Art. 29).

⁹⁶ Pursuant to EEIG Regulation, Art. 17(2) the decisions that require unanimity include: Alteration to the objects and duration of the grouping; transfer of the official address of the grouping; changes to the number of votes allocated to each member; changes to the obligations of the members unless the formation contract says otherwise; changes to the contributions of the members to the grouping's financing; and changes to the formation contract (unless otherwise provided for in the formation contract).

⁹⁷ EEIG Regulation, Art. 17(3).

⁹⁸ EEIG Regulation, Arts 16 and 17.

⁹⁹ EEIG Regulation, Art. 17(3).

¹⁰⁰ Pursuant to EEIG Regulation, Art. 17(3) unless otherwise provided for in the formation contract, decisions shall be taken unanimously by the members.

¹⁰¹ EEIG Regulation, Art. 19(3).

The provisions of the EEIG Regulation permit the creation of a grouping by natural and legal persons in different Member States in order to establish and maintain links between them, whilst at the same time permitting these entities engaged in the grouping to retain their individual identity and legal independence.¹⁰²

To further the needs of the grouping and its constituent members (collectively and individually), the EEIG Regulation endows the grouping with legal capacity.¹⁰³ In order to permit the grouping to achieve its objectives, provision is made in the EEIG Regulation for the grouping to be represented vis-à-vis third parties by an organ that is legally separate from its membership.¹⁰⁴ The grouping will 'have the capacity, in its own name, to have rights and obligations of all kinds.'¹⁰⁵ As such, it will have the ability to contract and to execute other legal acts, as well as to sue and to be sued.¹⁰⁶

It is this legal capacity that is endowed on the EEIG that effectively distinguishes the EEIG from loose contract-based forms of collaboration.

XI. Facility and Efficiency

The EEIG is not only adaptable it is also governed by far less legal regulation than most national corporate forms in the individual Member States as well as other supranational corporate forms such as the SE. This in turn generates efficiency and facilitates operations.

Formation, the acquisition of legal capacity, the right to create a secondary establishment and to transfer an official address are far easier for a grouping than they are for an SE or for most national corporate entities across the EU. These efficiencies coupled with the fact that there is no minimum capital requirement associated with the formation of the EEIG¹⁰⁷ result in comparatively large savings on transactional costs as well as a reduction in the time expended.

The formation of a grouping is a relative fast and cost-effective process when compared with the formation processes associated with the creation of certain national entities in the various jurisdictions in the EU and the other European corporate forms such as the SE. Whereas pre-1989, a whole network of joint ventures needed to be concluded in order to create a European wide network, post-1989 the EEIG effectively helps streamline affairs thereby facilitating cross-border collaborations.¹⁰⁸

In the case of the EEIG, once the contract for the formation of the grouping is drawn up¹⁰⁹ by the members, it needs to be filed (at a designated registry¹¹⁰ in the Member State in which the grouping is to have its official address) and published (firstly in a designated national gazette¹¹¹ and then in the Official Journal of the European Union).¹¹²

¹⁰² Companies House 2012, 5.

¹⁰³ EEIG Regulation, Art. 1(2). It will be for each Member State to determine if a grouping registered at its registry (in accordance with EEIG Regulation, Art. 6) will have legal personality (EEIG Regulation, Art. 1(3)). Professor Werlauff states that even if this is so this would make no difference in relation to the liability of the obligations of the grouping as in relation to these obligations all the members of the grouping are liable on an unlimited scale and on a joint and several basis, though the 'consequences of such liability' are to be determined by national law. (Werlauff, EU - Company Law, 120)

¹⁰⁴ EEIG Regulation, Preamble states '[w]hereas, to enable a grouping to achieve its purpose, it should be endowed with legal capacity and provision should be made for it to be represented vis-à-vis third parties by an organ legally separate from its membership.'

¹⁰⁵ EEIG Regulation, Art. 1(2).

¹⁰⁶ EEIG Regulation, Art. 1(2).

¹⁰⁷ Mr Jean Pierson executive director of Airbus Industrie praised the EEIG as a form lacking a minimum capital requirement. (Dine, 'The European Community's Company Law Directives - Changing the Balance of Power?', 44)

¹⁰⁸ Abell and Blin, 'EC Economic Interest Groupings come to life', 11.

¹⁰⁹ In line with the conditions set out in EEIG Regulation, Art. 5.

¹¹⁰ EEIG Regulation, Art. 6.

¹¹¹ EEIG Regulation, Art. 8.

¹¹² EEIG Regulation, Art. 11.

Compared with contractual collaborations, the grouping acquires, as of the date of its registration, the capacity in its own name to have rights and obligations.¹¹³ This permits participating members the facility of transacting as the EEIG. In other words, rather than each member having to transact in its own right, the EEIG is able to transact as an entity on behalf of all participating members.

In the event that a grouping creates an establishment in a Member State other than the one in which it has its official address, the grouping is required to register this establishment in the Member State in which it is situated¹¹⁴ by the straightforward act of filing the same documentation used for the purpose of primary registration together with an appropriate translation.¹¹⁵

A grouping is permitted to transfer its official address within the EU by the provisions of the EEIG Regulation. In the event that such a transfer does not result in a change in the law applicable, the transfer is a fairly straightforward affair. What is more, such a transfer will not result in the winding-up of the EEIG or in the creation of a new legal person. In contrast, national public companies are only generally allowed to transfer their registered office domestically and national public companies incorporated in Member States supporting the real seat theory cannot generally transfer their registered office to another Member State without winding-up and creating a new legal person.

When the decision to transfer the official address of the grouping within the EU does not entail a change in the law applicable to the grouping, the decision to transfer may be taken in accordance with the conditions laid down in the contract for the formation of the grouping.¹¹⁶ The conditions for such a decision are effectively determined by the members themselves. The members may decide that such a transfer requires a simple majority vote (rather than a unanimous vote) or alternatively that the decision to transfer is at the discretion of the manager or managers without the need for a vote by the members.

In comparison, a transfer in the EU resulting in a change of applicable law is far more heavily regulated. Such a move is subject to certain strict procedural steps.¹¹⁷ Firstly, a transfer proposal will need to be drawn-up, filed and published.¹¹⁸ Secondly, a unanimous decision will need to be taken by the members of the grouping. Such a decision may not be taken for a period of two months after publication of the proposal. If approved, the transfer takes effect on the date on which the grouping is registered at the registry for the new official address. That registration by the designated registry can only be made once evidence is furnished by the grouping showing that the proposal to transfer the official address has been published.¹¹⁹

By comparison with the EEIG, the procedure associated with the transfer of a registered office by the SE requires compliance with far stricter conditions.¹²⁰

Before an SE may transfer its registered office, the management or administrative organ of the SE must compile and publish a transfer proposal and draw-up a report explaining and justifying the legal and economic aspects of the transfer as well as explaining the implications of such a transfer for the shareholders, creditors and employees of the SE.

¹¹³ EEIG Regulation, Art. 1(2).

¹¹⁴ EEIG Regulation, Art. 10.

¹¹⁵ EEIG Regulation, Art. 10.

¹¹⁶ EEIG Regulation, Art. 13.

¹¹⁷ EEIG Regulation, Art. 14.

¹¹⁸ Publication per EEIG Regulation, Arts 7 and 8 are mandated for by EEIG Regulation, Art. 14.

¹¹⁹ EEIG Regulation, Art. 14.

¹²⁰ EEIG Regulation, Art. 8 permits an SE to transfer its registered office from one Member State to another on the proviso that it complies with the conditions set out in Art. 8, paras 2-13.

The shareholders and creditors of the SE are permitted to examine both documents at least one month before the general meeting called upon to decide on the transfer. No decision to transfer may be taken for a period of two months after publication of the transfer proposal.

Before the competent national authority issues a certificate attesting to completion of the acts and formalities to be accomplished before a transfer, the SE must satisfy it that liabilities arising prior to the publication of the transfer proposal, the interests of creditors and holders of other rights in respect of the SE (including those of public bodies) have been adequately protected in line with the provisions of national law in the Member State in which the SE has its registered office.

The registration of the new registered office of the SE will only take place once the aforementioned certificate has been submitted and evidence has been given that the formalities required for registration in the country of the new registered office have been completed.

As the transnational costs associated with creation of an EEIG are relatively low and the mobility of the EEIG involves minimal organisational and sunk costs, this supranational form is able to entice businesses and professionals to join forces with their counterparts in other Member States.¹²¹ In addition, the availability of this corporate structure enhances the ability of the EU to attract inward investment from entities based outside the EU.

XII. Ancillary Nature of the Grouping

The grouping is intended to be used to facilitate or develop the economic activities of members¹²² without the activities of the grouping being more than ancillary to the economic activities of constituent members. Furthermore, the EEIG is not intended at anytime to take over the activities of its constituent members.

Since the members enter the grouping as going concerns and the grouping is merely auxiliary to the existing operations of the members, the creation of the EEIG neither affects the national operations of the constituent members nor undermines their autonomy as distinct and separate entities.

This state of affairs allows participating members in the EEIG to preserve their individual identity, retain their own corporate culture, as well as to engage in business activities 'under their own names, and be associated with particular member states'.¹²³ As such the EEIG facilitates cross-border alliances without compromising or damaging the national character of the individual constituent members.¹²⁴ Moreover, the establishment of a grouping will not typically undermine the corporate culture or identity of the participating members. For this reason, such an entity is unlikely to run the risk of being torn apart by the disparate cultures and identities of its members.

Moreover, as the EEIG is not permitted to hold shares in its constituent members nor exercise management control over such members, the grouping effectively works for the members themselves and not vice versa.¹²⁵

XIII. The Membership of Non-European Entities in Groupings

Since the EEIG is intended to promote cross-border cooperation between entities operating in different Member States, certain restrictions are imposed on admissibility to the grouping and the availability of such groupings to different entities, one such restriction concerns membership of groupings.¹²⁶

¹²¹ Donald, 'Company Law in the European Community: Toward Supranational Incorporation', 24.

¹²² EEIG Regulation, Art. 3.

¹²³ Conrad, 'European Alternative to Uniformity in Corporation Laws', 2164.

¹²⁴ Conrad, 'European Alternative to Uniformity in Corporation Laws', 2164.

¹²⁵ Companies House, 2012, 6.

¹²⁶ Carreau and Lee, 'Towards A European Company Law', 505 quoting from European Commission, *Nineteenth General Report on the Activities of the European Communities* 21, 112 (1986).

In this context, membership of a grouping is limited to legal persons formed under the law of a Member State with a registered or statutory office and central administration in the EU.¹²⁷

Notwithstanding this provision, the EEIG Regulation does permit national level derogation. According to the Regulation, in the event that the law of a specific Member State does not require an entity to have a registered or statutory office, it will suffice for an entity wishing to participate in a grouping to have its central administration in the EU.¹²⁸

Non-European entities looking to participate in a grouping will effectively have a number of options available to them.

Firstly, they may establish a registered or statutory office and central administration in the EU. Secondly, they may establish a base of operations in a Member State whose law does not require entities to have either a registered or statutory office, on the proviso that this base of operations can be classed as the entity's central administration. Thirdly, they may become involved in the grouping as associated members.¹²⁹ This could be achieved through the use of underlying agreements.¹³⁰ Finally, they could become involved with a grouping under the auspices of a larger cooperation such as a partnership or joint venture.¹³¹

Referring to the first option mentioned above, Professors Donald and Chiffen both suggest that a non-European entity with a subsidiary established in the EU should be permitted to participate as a member in a grouping on the proviso that the subsidiary is independently incorporated and registered under the law of a Member State and its central administration is located in the Member State.¹³²

Professor Donald adds that the subsidiaries of non-European companies would be permitted to coordinate their activities using a grouping as a corporate vehicle so long as each subsidiary is incorporated in a distinct Member State.¹³³ In contrast, he contends that branches or offices of non-European entities which are not formed under Member State law would not be permitted to become members of groupings.¹³⁴

XIV. Secondary Registration and Transfer of the Registered Office

A grouping registered in one Member State is permitted to create one or more secondary establishments across the EU on the proviso that the establishment or establishments are registered in the Member State or States in which they are situated.¹³⁵ The requisite registration process is relatively

¹²⁷ EEIG Regulation, Art. 4(1) which states '[o]nly the following may be members of a grouping: (a) companies or firms within the meaning of the second paragraph of Article 58 of the Treaty and other legal bodies governed by public or private law, which have been formed in accordance with the law of a Member State and which have their registered or statutory office and central administration in the Community; where, under the law of a Member State, a company, firm or other legal body is not obliged to have a registered or statutory office, it shall be sufficient for such a company, firm or other legal body to have its central administration in the Community; (b) natural persons who carry on any industrial, commercial, craft or agricultural activity or who provide professional or other services in the Community.' The second paragraph of Article 58 of the Treaty of Rome states that '[t]he term "companies" shall mean companies under civil or commercial law including co-operative companies and other legal persons under public or private law, with the exception of non-profit-making companies.'

¹²⁸ EEIG Regulation, Art. 4(1) states 'where, under the law of a Member State, a company, firm or other legal body is not obliged to have a registered or statutory office, it shall suffice for (it) ... to have its central administration in the Community.'

¹²⁹ Werlauff, EU - Company Law, 122.

¹³⁰ Werlauff, EU - Company Law, 122.

¹³¹ Werlauff, EU - Company Law, 122.

¹³² Donald, 'Company Law in the European Community: Toward Supranational Incorporation', 16. Chiffen, 'Establishing Business Operations in the European Economic Area: Key Company Law Principles', 103.

¹³³ Donald, 'Company Law in the European Community: Toward Supranational Incorporation', 24.

¹³⁴ Donald, 'Company Law in the European Community: Toward Supranational Incorporation', 16.

¹³⁵ EEIG Regulation, Art. 10.

simple, requiring only the filing of the documentation previously used for the purpose of the primary registration coupled with a translation.

A grouping has the option of transferring its official address within the EU, either within the same Member State or between Member States. A transfer of the official address of the grouping that does not result in a change in the law applicable will only require compliance with the terms set out in the contract for the formation of the grouping, rather than any strict procedural rules imposed by the EEIG Regulation.¹³⁶ With this in mind, the members participating in the grouping may decide to delegate such decisions to the management of the grouping.

XV. Benefits Enjoyed by Individual Members

Certain features associated with the EEIG make it attractive to the individual members participating in the grouping. Beyond the versatility associated with financing, the operational flexibility extended to groupings and the absence of a capital requirement for groupings, certain features associated with the EEIG make it attractive to the participating members.

Each member has at least one vote subject to the terms of the contract for formation which may extend more than one vote to certain members so long as no one member holds a majority of the votes.¹³⁷

Notwithstanding the fact that the day-to-day management of the grouping is entrusted to the manager or managers of the grouping, each member has the power to request information from the manager or managers of the grouping concerning, what the Regulation terms, the *business of the grouping*.¹³⁸ The wording of this provision is drafted widely enough to technically encompass all forms of information relevant to the grouping and its operations.

In addition to the right to request information about the business of the grouping, each member is entitled to inspect the books and business records of the grouping.¹³⁹

Participation rights in the grouping are transferrable. Members accordingly enjoy the freedom to assign their participation in the grouping,¹⁴⁰ in its entirety or in a partial form, either to another member or to a non-member. Such an assignment is possible with the unanimous approval of the other members.¹⁴¹ This feature permits a constituent member to sell its business and with it its participation rights in the grouping. Such rights are likely to have the effect of enhancing the value of the business to be sold.

Alternatively a member may use participation rights in the grouping as security.¹⁴² Such an act may only be taken with the unanimous approval of the other members unless the contract for the formation of the grouping provides otherwise.¹⁴³ Protection of the other members in the grouping is ensured by the fact that the holder of the security is not permitted to become a member of the grouping at any time by virtue of the security.¹⁴⁴

In the event that a member wishes to withdraw from the grouping for whatever reason, other than assignment of its rights, the value of its rights and obligations is determined by reference not to a value fixed in advance by the members (in the contract for formation for example) but rather by

¹³⁶ EEIG Regulation, Art. 13.

¹³⁷ EEIG Regulation, Art. 17(1).

¹³⁸ EEIG Regulation, Art. 18.

¹³⁹ EEIG Regulation, Art. 18.

¹⁴⁰ EEIG Regulation, Art. 22(1).

¹⁴¹ EEIG Regulation, Art. 22(1).

¹⁴² EEIG Regulation, Art. 22(2).

¹⁴³ EEIG Regulation, Art. 22(2).

¹⁴⁴ EEIG Regulation, Art. 22(2).

reference to the real value of the assets and liabilities of the grouping as they stand at the time the member in question ceases to belong to the grouping.¹⁴⁵ A member (withdrawing from the grouping) may accordingly strategically select the time when it wishes to withdraw from the said grouping, maximising its return and minimising the costs associated with such a withdrawal.

Interestingly enough the Regulation does not apply this valuation rule to the situation when the member assigns his rights.¹⁴⁶ Presumably this is due to the fact that there is an assumption that any assignment would be negotiated between the member assigning his membership in the grouping and the party buying the assigned interest in the grouping.¹⁴⁷

In order to limit the exposure of members and provide for transactional certainty, a limitation period of five years is prescribed when a member withdraws from a grouping, in connection with debts and liabilities arising out of the activities of the grouping before the member ceased being a member.¹⁴⁸ A similar provision is made in relation to liquidations of groupings, when the limitation period of five years trammels the liability of members for debts and other liabilities arising out of the activities of the grouping.¹⁴⁹

Part IV – Drawbacks

Whilst the EEIG offers clear perquisites to entities looking to engage in cross-border collaborations or formalise existing ones, certain drawbacks are associated with this set-up.

I. Risk of Divergencies

The legal framework for the grouping encapsulated within the EEIG Regulation requires supplementation by national law resulting in a stratified regulatory system for groupings.

The legal amalgam governing groupings combines Union law on one hand and national law on the other. This hybrid system means that the application of the EEIG Regulation is not made particularly easy.

One such divergency is the tax regime applicable to EEIGs. Whilst the regime applicable to groupings is touched upon in the Regulation the latter fails to 'provide much guidance on the tax treatment of profits made and losses suffered by an EEIG'.¹⁵⁰

Though Article 21(1) of the Regulation indicates that 'the profits resulting from an EEIG's activities are deemed to be profits of the members',¹⁵¹ the 'only real tax provision in the whole regulation'¹⁵² is Article 40 which indicates that 'profits or losses resulting from the activities of an EEIG are taxable only in the hands of its members'.¹⁵³ This 'short' Article is supplemented by the preamble to the Regulation that indicates that 'otherwise national tax laws apply, particularly as regards the apportionment of profits, tax procedures and any obligations imposed by national tax law'.¹⁵⁴

¹⁴⁵ EEIG Regulation, Art. 33.

¹⁴⁶ EEIG Regulation, Art. 33.

¹⁴⁷ Donald, 'Company Law in the European Community: Toward Supranational Incorporation', 23.

¹⁴⁸ Pursuant to EEIG Regulation, Art. 37(1) unless national law prescribes for longer periods, a limitation period of five years exists after publication of the notice of the member's withdrawal from the grouping against the departing member in connection with debts and liabilities arising out of the activities of the grouping before the member ceased being a member.

¹⁴⁹ Pursuant to EEIG Regulation, Art. 37(2) a limitation period of five years exists after publication of the notice - prescribed by Art. 8 - of the conclusion of the liquidation of a grouping for actions against a member in connection with debts and other liabilities arising out of the activities of the grouping.

¹⁵⁰ Everaert, 'An EEIG: When and where is it a permanent establishment?', 27.

¹⁵¹ Everaert, 'An EEIG: When and where is it a permanent establishment?', 27.

¹⁵² Everaert, 'An EEIG: When and where is it a permanent establishment?', 27.

¹⁵³ Everaert, 'An EEIG: When and where is it a permanent establishment?', 27.

¹⁵⁴ Everaert, 'An EEIG: When and where is it a permanent establishment?', 27-28.

Since the Regulation does not address the question of taxation (other than direct income taxes), an EEIG may well be subjected to taxes in each of the states in which it operates including but not limited to value added taxes, indirect real estate taxes or specific local taxes.¹⁵⁵

The question arises as to whether or not members of the EEIG will be liable to income taxes on the profits generated by the EEIG in the country in which the head office of the EEIG is registered.¹⁵⁶

II. Unlimited Liability

Akin to the joint venture partnership, the participants in the EEIG do not enjoy limited liability.¹⁵⁷ On the whole, this state of affairs is likely to have a dampening effect, by curtailing participation in groupings, impeding its activities as a corporate form, reducing its popularity as an investment vehicle and adversely impacting on the economic stability and growth of the EU.

As a concession to the lack of a capital requirement, members of the grouping bear unlimited joint and several liability for the debts and obligations of the grouping.¹⁵⁸ As such there is no limit on the financial liability of any of the members for the activities of the grouping and each member can individually be held liable for such activities.¹⁵⁹

This state of affairs is likely to compel potential members to opt for a corporate vehicle that will provide them with the benefit of limited liability over a grouping that exposes them to unlimited joint and several liability.

The potential activities of the grouping may also be hindered by this feature for a number of reasons. Firstly members may only elect to get involved in projects that the members perceive as low risk projects. For this reason, members of the groupings may be averse to research and development projects due to the high sunk costs and inherent risks associated with such ventures.

In addition, members may limit the range of activities of the grouping in the formation contract ensuring a tighter control over management, meaning that management will need to defer to the members when certain decisions arise in the daily operations of the grouping. Such an arrangement is likely to slow down the activities of the grouping and its ability to react to changes in market conditions thereby reducing its ability to compete effectively.

This situation is not only likely to impede upon the activities of the grouping, but also to have a dampening effect on economic growth across the EU.

It has been argued that whilst this facet is a disadvantage in terms of tort liability, it may represent an advantage for lenders and in turn for participating members. As far as lenders are concerned, each participating member in the grouping will be responsible for the debts of the grouping¹⁶⁰ thereby spreading the risk for a loan amongst the participating members. In practical terms this may facilitate the financing of groupings in general and in particular collaborations under the aegis of the grouping that are of a high risk nature. When loaning funds to a grouping, lenders are safe in the knowledge that each member would be responsible for the debts of the grouping.¹⁶¹

III. Inability to Raise Funding from the Public

¹⁵⁵ Everaert, 'An EEIG: When and where is it a permanent establishment?', 28.

¹⁵⁶ Everaert, 'An EEIG: When and where is it a permanent establishment?', 28. A review of taxation of EEIG members is provided in Everaert, 'An EEIG: When and where is it a permanent establishment?'.

¹⁵⁷ Engle, 'The EU Means Business: A Survey of Legal Challenges and Opportunities in the New Europe', 378.

¹⁵⁸ Companies House 2012, 6.

¹⁵⁹ Companies House 2012, 6.

¹⁶⁰ Engle, 'The EU Means Business: A Survey of Legal Challenges and Opportunities in the New Europe', 378.

¹⁶¹ Engle, 'The EU Means Business: A Survey of Legal Challenges and Opportunities in the New Europe', 378.

A grouping is not permitted to invite investment from the public.¹⁶² As such the grouping as an entity can only rely on contributions or loans from its members. This state of affairs is likely to curtail the ability of the grouping to raise capital for ventures and will in turn adversely impact upon its potential for future growth.

Whilst a grouping cannot be used by a banking consortium for an investment project involving investment by the public, it may arguably be used by a group of banks in the raising of syndicate loans to undertakings and public bodies on the proviso that the invitation for investment is not made to the public.¹⁶³

IV. Exposure to European Competition Law

Groupings are not exempted from competition law and can fall foul of European and national competition law.

The grouping 'represents the framework surrounding the co-operation of the members. It does not provide them with a guarantee that their co-operation is lawful under the competition provisions of the EU ... The choice of a legal form which is blessed by the EU does not represent a letter of release in relation to the cartel rules.'¹⁶⁴

The coordination of activities between the members may fall foul of Article 101 TFEU. Accordingly the members of the prospective grouping should give careful consideration to whether their cooperation may be contrary to this Article and if it is, they should consider whether such cooperation is exempted.¹⁶⁵

V. Usage is Limited in a Number of Respects

Though it had been hoped that the EEIG would encourage cooperation between European entities, its use as a corporate form is limited in a number of respects by the provisions of the EEIG Regulation. This state of affairs has had the net effect of curtailing the functions that may be assigned to EEIGs.¹⁶⁶

In order to safeguard the interests of employees and creditors of the constituent members, as well as the autonomy of the participating members, the activities of the EEIG must not be more than ancillary to the economic activities of the constituent members and at no time may the grouping take over the activities of the constituent members, by assuming a management role, holding shares in the undertaking of the member or members, or indeed replacing or absorbing the operations of a member or members.

In order to safeguard the interests of employees and creditors of the constituent members, the financial position of the grouping is strictly regulated. For this reason, the grouping is not permitted to make loans or transfer property to either a director or a person connected to the director and may not become a member in any other grouping.

Conclusion

All in all from the point of view of the EU and the individual Member States, the EEIG obviously encourages cross-border cooperation due to the benefits that this form lends to entities engaged in cross-border activities.

¹⁶² EEIG Regulation, Art. 23.

¹⁶³ Werlauff, EU - Company Law, 122.

¹⁶⁴ Werlauff, EU - Company Law, 119.

¹⁶⁵ Alison Jones and Brenda Sufrin, *EU Competition Law : Text, Cases & Materials*, chapter 3 (Oxford: Oxford University Press, 2010).

¹⁶⁶ Carreau and Lee, 'Towards A European Company Law', 505 referring to the EEIG Regulation.

The grouping is characterised by an ability to evolve gradually in line with the needs of constituent members and represents an economically efficient tool for businesses.

To a certain degree, one could say that the benefits discussed above are eroded by the drawbacks associated with this structure. This state of affairs is likely to have a dampening effect, by curtailing participation in groupings, impeding its activities as a corporate form, reducing its popularity as an investment vehicle and adversely impacting on the economic stability and growth of the EU.

After more than two decades since the introduction of the EEIG and bearing in mind the level of integration that has taken place in the EU since 1989, perhaps the time has come for a fresh look at the EEIG.¹⁶⁷

In order to enhance the use of the grouping as a structure for cross-border collaboration and to encourage inward investment in the EU, arguably the following reforms should be borne in mind.

Conceivably the EEIG Regulation should be extended to create a more comprehensive supranational framework of rules addressing some of those issues that hitherto have been within the domain of the Member States, whilst retaining the provisions that extend powers to constituent members. This will ensure a higher degree of conformity limiting the divergencies that presently exist.

Perhaps the participants in the EEIG should enjoy limited liability.¹⁶⁸ The protection of creditors could be guaranteed instead by the imposition of a minimum capital requirement or in the alternative a structure should be created whereby one or more of the members participating in the EEIG bear unlimited liability whilst the others benefit from limited liability.

¹⁶⁷ Enacted by the Council of Ministers on 25th July 1985 after more than a decade of discussion, the Regulation governing EEIGs became applicable from 1st July 1989 in the Member States (EEIG Regulation, Art. 43).

¹⁶⁸ Engle, 'The EU Means Business: A Survey of Legal Challenges and Opportunities in the New Europe', 378.